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No. 814

In the
Supreme Court of the United States
OCTOBER TERM, 1969

RICHARD D. IRWIN and
ANNE MARIE IRWIN,
Petitioners,

vs.

DEMPSEY-TEGELER & CO., INC.,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Question Presented For Review

Petitioners made sales of National Video stock through the respondent broker during a period when National Video stock was split.[1] Following the completion of Irwin's sales, the broker erroneously advised Mr. Irwin that he owed a balance of 2,000 National Video shares, when in fact he owed 2,500 shares to the broker. After a delay of approximately three months, the broker discovered its error and advised Irwin that he still owed 500 shares. Irwin questioned whether he owed the 500 shares, but promised

[1] Mr. Irwin acted as his wife's agent in dealing with respondent, handled all security transactions for his wife's account and had full authority from her to buy and sell securities on her behalf (9-10, Irwin Deposition, Vol. 1 pp. 34-35). Unless otherwise indicated, all references are to pages of the Joint Appendix.

that if it was proved that he owed them, he would deliver the shares even if he had to purchase them (Irwin had already sold the missing 500 shares through another broker). Irwin's own accountants subsequently confirmed that he did in fact owe the missing 500 shares claimed by the broker. Irwin then for the first time repudiated his promise, refused to deliver the missing 500 shares and the broker, after due notice, purchased an equivalent number of shares in the open market. On these undisputed facts, the District Court entered summary judgment in favor of the broker, holding that there was no genuine issue of material fact and that the broker was entitled to judgment as a matter of law on two distinct grounds, (1) that Irwin's promise to deliver the missing 500 shares if he owed them constituted a ratification of any prior erroneous advice and delay by the broker, and (2) that Irwin was equitably estopped to deny liability in view of the broker's action in postponing a covering purchase of the missing shares in reliance on Irwin's promise to deliver the shares if he owed them. The Court of Appeals affirmed the District Court on the first ground of ratification and did not find it necessary to reach the second ground of equitable estoppel.

The sole issue presented here is whether at the time of his promise to deliver the missing shares if he owed them, Irwin had sufficient knowledge of the material facts to be able to effectively ratify the broker's prior delay and erroneous advice. The courts below held that Irwin's undisputed knowledge of his prior sales transactions, together with his knowledge of the broker's earlier erroneous advice and the broker's intervening delay in claiming the missing shares constituted sufficient knowledge of the material facts and that Irwin, therefore, effectively ratified any negli-

gence by the broker. Petitioners contend that this knowledge was not sufficient as a matter of law and Irwin should not be bound by his undisputed promise absent proof that he knew at the time whether or not he was in fact short the 500 shares (Pet., pp. 18-21).

Statement of the Case

The material facts are adequately set forth in the opinions of the District Court (A1-A18 of separate Appendix to the Petition and 231-250 of the Joint Appendix) and of the Court of Appeals (reported at 415 F. 2d 1348 and reprinted at pp. 1a-6a, Appendix to the Petition).

Reasons For Not Granting The Writ

1. The issue presented is a narrow question of state law as to what knowledge is required on the part of a customer before he can effectively ratify his broker's mistake. This issue has little significance beyond the unusual circumstances of this case and lacks the importance which would justify review by this Court.

2. The decision below is based on undisputed facts and is correct as a matter of law.

3. There is no conflict between the decision below and any decision of this Court or other courts of appeal relied on in the Petition.

4. No issue of federal law is involved apart from the claim that there was a genuine issue of material fact precluding the entering of summary judgment under Rule 56. However, both courts below correctly decided that the material facts are undisputed. There is no important question of federal law requiring decision by this Court.

ARGUMENT

I.

The Decision Below Is Clearly Correct. Irwin's Promise in Early 1966 to Deliver 500 National Video Shares to Dempsey-Tegeler If Petitioners Owed Them Ratified Any Prior Breaches of Duty by Dempsey-Tegeler. There Is No Genuine Issue of Material Fact Regarding Irwin's Ratification.

The Irwins' position is that Dempsey-Tegeler is barred from recovery in this case because of various negligent breaches of duty. The breaches of duty ascribed by Irwin to Dempsey-Tegeler boil down to the claim that Dempsey-Tegeler erroneously advised him in mid-November 1965 that petitioners owed only 2,000 National Video shares to Dempsey-Tegeler, when in fact they owed 2,500 shares and that Dempsey-Tegeler delayed until early 1966 before advising Irwin of petitioners' short position and requesting delivery of the missing shares.[2]

The District Court and the Court of Appeals held that even assuming Dempsey-Tegeler guilty of the breaches of duty charged by the petitioners, Dempsey-Tegeler nevertheless is entitled to recover in view of Irwin's undisputed promise in early 1966 to deliver the missing shares if petitioners owed them. The courts below correctly held that this promise ratified any prior breaches of duty by Dempsey-Tegeler.

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[2] The missing 500 shares were sold by Irwin on December 27, 1965 through another broker for proceeds of $38,604.78, proceeds which petitioners have retained. Petitioners had previously realized a profit of approximately $111,000 on their purchases and sales of National Video stock through Dempsey-Tegeler. Irwin deposition, Vol. II, pp. 94-95.

Here is Irwin's own testimony regarding his crucial ratifying promise:

> [Mr. Irwin] "A. It would be after the first of the following year when this development came about that Dempsey-Tegeler then began to say that I owed them five hundred shares of Video and that I had a short position. And I explained to Mr. Shields that I had delivered in accordance with his request and the request of Dempsey-Tegeler; that I was unaware that I was in a short position; that I had never been in a short position on any stock in my life; and as far as Video was concerned, that if they could prove to me that I owed the shares, I would deliver the shares if I had to purchase them.
>
> • • •
>
> "And I made the statement to him at that time that I had no desire to prove it at the expense of anybody, and that if I owed the shares, I would deliver the shares. But I wanted proof of it." (207-08).

When asked how the matter was left at the end of that conversation, Irwin testified:

> "When they delivered proof if I owed the shares I would deliver the shares." (208).

After Dempsey-Tegeler wrote to petitioners on March 17 explaining the petitioners' short position, and on March 28 repeating its request for the missing shares, his own accountants finally confirmed to Irwin on April 15, 1966 that the petitioners did, in fact, owe 500 National Video shares to Dempsey-Tegeler. But by this time the market price of National Video stock had gone up to approximately $111 per share and the petitioners refused to deliver the stock. On April 18, following this repudiation of their obligation by petitioners, Dempsey-Tegeler replaced the missing shares by purchasing them in the open market.

Irwin's assurance, given to Mr. Shields when he was first asked for the missing shares in early 1966, that he would deliver the missing shares if and when it was proved that he owed them, constituted an express ratification of any prior erroneous advice, delay, or other delinquency by Dempsey-Tegeler. Both courts below correctly held that this assurance ratified any prior breaches of duty by Dempsey-Tegeler and thus made the petitioners liable for the amount which Dempsey-Tegeler had to pay on April 18 to replace the missing shares after petitioners refused to deliver the shares in the face of their own accountants' confirmation that they did owe the shares.

Both courts below also correctly held that at the time of his promise Irwin had knowledge of the material facts regarding his transactions in National Video stock and the prior breaches of duty he has charged against Dempsey-Tegeler. He had undisputed knowledge at that time of his transactions involving the purchase and sale of National Video shares, he knew that during November 1965 Dempsey-Tegeler failed to request delivery of all the shares due after petitioners' October and November sales and he knew that Dempsey-Tegeler failed for three to four months thereafter to notify him of petitioners' short position (192, 206-207, 244), 415 F.2d at p.1351.

The applicable principle is explained in Meyer, *The Law of Stock Brokers and Stock Exchanges* (1931):

> "The general principle is that any wrongful act on the broker's part may at the election of the customer be either ratified or repudiated. . . . Any wrong committed by a broker, no matter how serious and no matter what its nature, is susceptible of ratification. This applies to the improper execution or non-execution of an order, to the wrongful sale of the customer's securities or the wrongful covering of short commitments,

and to all kinds of miscellaneous breaches of duty of which the broker may become guilty during the course of his relations with his customer.

* * *

"The first principle of ratification in stock-brokerage transactions is that a customer who wishes to take advantage of his broker's wrongful act must repudiate that act. If he does not he is deemed to have ratified it. He may not merely sit by and do nothing, but is bound at the risk of the loss of his claim affirmatively to indicate his repudiation.

> 'Ratification may be proved, not only by an express assent, * * * but also by implication from the principal's acquiescence or failure to dissent within a reasonable time after being informed by the agent of what he has done.'

"This doctrine is not unfair, for the customer should not have the privilege of withholding approval or disapproval until the market has taken a turn for better or for worse, and then assuming the position which turns out the more profitable. To accord the customer that privilege would enable him to speculate at the broker's expense. Moreover, the broker should not be placed in a position where he does not know whether his act will be affirmed or disaffirmed, and therefore cannot act intelligently to minimize his own loss before the market has undergone too great a change. The obligation to repudiate, however, does not depend on whether or not the broker in fact relies on the customer's silence." (408-12).

See also *Clews* v. *Jamieson,* 182 U.S. 461, 483, 484, 45 L.Ed. 1183, 1194 (1901); *Schaefer* v. *Dickinson,* 141 Ill.App. 234, 237 (1908); *Roney* v. *Mazzara,* 319 Mich. 103, 29 N.W. 2d 259 (1947) and *Gillett* v. *Whiting,* 141 N.Y. 71, 35 N.E. 939 (1894).

The petitioners' sole attack on the decision below is that at the time of his crucial promise Irwin did not have knowl-

edge of all of the material facts. It is difficult to determine what specific facts petitioners claim were material and not known to Irwin. At times, the Petition vaguely suggests that Irwin lacked sufficient knowledge concerning Dempsey-Tegeler's breaches of duty. Pet. p.17,20. However, as we have shown, he did then know that the broker failed in November 1965 to request delivery of all of the National Video shares which were then due, and then delayed for three to four months thereafter before informing him of his short position. These were the key breaches of duty charged against Dempsey-Tegeler. The Petition implies a theory on which a customer could never be bound even by an express ratifying promise unless he knows not just the material facts concerning the broker's mistake but also all of the details and circumstances which led to the broker's error. Such a rule would be absurdly impracticable and unfair; it would completely undermine the doctrine of ratification and invite customers to speculate at their broker's expense.

The only fact which petitioners specify about which Irwin did not have knowledge at the time of his promise was whether or not the petitioners were in fact short the missing 500 shares. However, a sufficient answer was given by both courts below, namely, to require such knowledge before holding Irwin bound by his unequivocal promise would make the promise meaningless and would defeat the purpose of the doctrine of ratification which is to protect a broker in these very circumstances.

The District Court answered this contention as follows:

> ". . . [T]he true facts of defendants' position in National Video is irrelevant to the issue of ratification. Irwin's promise contemplated that he would make up the asserted short position if it could be proved that he was short. Whether or not he actually knew he was

short at the time he made the promise, is irrelevant to the force of that promise. To say that he cannot be held to such an unqualified promise, because he did not in fact know for certain that he was short, would make the promise virtually meaningless. Of course he did not know the true facts of the situation, for if he had, there would have been less occasion to make the promise in the contingent manner in which it was made.

"Further defendants have pointed to no material fact regarding the plaintiff's breaches of duty, which Irwin did not know, but should have known in order to be bound by his ratification. It is not relevant that he was uncertain of his position in National Video. What is relevant is that at the time of his promise, he knew all of the material facts regarding the prior breaches of duty he has charged against plaintiff. He knew that plaintiff was calling upon the defendants to deliver 500 shares of National Video stock which plaintiff claimed were owing from sales in late 1965. Because he was apparently unaware of his short position, he demanded verification, requested his accountants to check into the matter, and expressly promised he would deliver the missing shares if it developed that he owed them. At that time, Irwin had full knowledge of all of the circumstances surrounding the alleged breaches of duty. Although defendants claim to the contrary, they have cited no specific facts of which he was unaware which might have affected the making of the promise." (243-44).

The rule requiring that a customer have knowledge of the material facts before he can effectively ratify his stock broker's breach of duty is typically applied in cases where the broker has deliberately concealed or misrepresented important facts, Meyer, *op.cit.*, p.433, such as whether a reported purchase or sale of securities was actually executed. *Matter of Dickinson,* 171 App.Div. 486 (New York, 1916);

Day v. *Holmes*, 103 Mass. 306 (1869). There is no suggestion here that Dempsey-Tegeler deliberately concealed or misrepresented any facts in its dealings with the petitioners. Further, as the District Court pointed out, Irwin's promise which was by its terms contingent on proof that the petitioners did in fact owe the missing 500 shares, would become completely meaningless if the petitioners could avoid that promise by pleading Irwin's uncertainty at the time regarding the very question which his promise contemplated should be resolved by proof.

At the time of his crucial promise, Irwin had knowledge of the material facts. The doctrine of ratification was properly applied in this case to prevent the unfair result it is designed to avoid, i.e., to prevent a customer from speculating at his broker's expense and to insure that the broker will know whether his acts will be affirmed or disaffirmed and be able to act to minimize his own loss before the market changes. Meyer, *op.cit.*, pp. 411-12. Irwin's assurance that he would deliver the missing shares if he owed them was given to Dempsey-Tegeler at a time when Dempsey-Tegeler could have replaced the stock at a price close to the price for which the petitioners in December 1965 sold the 500 shares which did not belong to them. The market price of National Video stock between February 14 and March 18, 1966 (the period during which Irwin made his promise) ranged between a low of $70.25 and a high of $88.25 per share (18-19) and the petitioners sold the missing 500 shares in December for approximately $78 per share (180). When Irwin gave his crucial promise to Shields, and thereafter until he repudiated his obligation on April 15, 1966, he gave Dempsey-Tegeler no warning that it should protect itself by buying in the missing shares. Irwin did not repudiate the petitioners' obligation until the market price of National Video had gone up to approxi-

mately $111 a share. Plaintiff was forced to pay this higher price in order to cover petitioners' short position at that time.

There is no dispute about the material facts. Irwin's promise is clear and is based on his own admissions. Petitioners' claim that Irwin lacked required knowledge at the time of his promise is without support in the facts and is erroneous as a matter of law.

Respondent also urges that the judgment below was correct on the alternative ground of equitable estoppel. We limit our argument on this point to a reference to the discussion of this issue by the District Court (245-47).

II.

This Case Was Appropriately Disposed of Below by Summary Judgment Because the Controlling Facts on the Issue of Ratification Were Undisputed. Petitioners Came Forward With No Genuine Issue of Fact Requiring a Trial. The Decision Below Is Not in Conflict With Any of the Cases Relied on in the Petition.

Although the District Court characterized the factual situation leading to this case as "somewhat complex" (231), the material facts developed in extensive discovery of documents and depositions taken by both sides are undisputed. The facts concerning petitioners' transactions in National Video stock are based on unchallenged documents in the record and are undisputed, as is the fact that following the petitioners' delivery of 2,000 shares during November 1965 they remained short 500 shares owed to the broker, shares which they had received in stock split. The facts regarding Irwin's crucial promise to deliver the shares if he owed them are based entirely upon Irwin's own admissions (206-08). Petitioners in the course of discovery took full depositions from four of Dempsey-Tegeler's employees. In addition, depositions were taken

from Irwin himself and his accountants (164). Petitioners had full opportunity to come forward in the depositions or by affidavit to develop any material evidence contrary to the undisputed material facts here with respect to Irwin's promise and ratification.

As Judge Learned Hand pointed out in *Radio City Music Hall Corp.* v. *U. S.*, 135 F.2d 715, 718 (C.A.2, 1943), where the plaintiff's proof is specific and the defendant has had an opportunity to cross examine, the defendant cannot oppose summary judgment by mere hypothesis, but must specify some opposing evidence which it can adduce, and which will change the result. The petitioners here have utterly failed to meet this requirement.

Part II of petitioners' argument in effect concedes that the material facts in this case were undisputed but relies on a line of cases holding that summary judgment is inappropriate where, although the facts are undisputed, conflicting inferences may be drawn from those facts. Petitioners argue that conflicting inferences are possible here regarding Irwin's intention and knowledge at the time of his crucial promise.

As to Irwin's intention to ratify, the Petition fails to raise any issue whatever, beyond the bare assertion that Irwin's promise was somehow ambiguous and equivocal. Pet., p.19. The only support advanced for this assertion is a reference to a statement in the Court of Appeals opinion that "Irwin was equivocal" when he was first informed that he was short 500 shares of National Video to Dempsey-Tegeler, 415 F.2d, at p.1350. But this clearly refers to Irwin's equivocation at that time as to whether he owed the shares which were still due to the broker (207-08). There was nothing at all ambiguous or equivocal about his undisputed promise at that time to deliver the

shares if he owed them. As the Court of Appeals said, on the very next page of its opinion:

> "Here there was no question as to the meaning of Irwin's words consenting to deliver the 500 shares." 415 F.2d, at p.1351.

As to Irwin's knowledge, the conflicting inferences which petitioners urged could be drawn from the evidence and testimony referred to at pages 20-21 of the Petition all boil down to the point which we have already fully discussed, that at the time of his crucial promise Irwin did not know whether he actually owed the 500 shares claimed by the broker. This is not in dispute. Dempsey-Tegeler has never claimed that the record shows such knowledge. However, as we have fully demonstrated in Part I of this Brief, the courts below correctly held that proof of such knowledge was not required in order to hold Irwin to his clear promise.

Conclusion

There is no merit in petitioners' contentions. Two courts below determined that on the undisputed material facts and applicable law Irwin's promise ratified the respondent's mistake and on this record he should be held to that promise. For all of the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 20, 1970